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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS DANIELS,

Defendant and Appellant.

B281307

(Los Angeles County
Super. Ct. No. BA427426)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Affirmed and Remanded.

Law Offices of Joy A. Maulitz and Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Carlos Daniels appeals from the judgment entered following his conviction by jury on one count each of attempted murder (Pen. Code, §§ 664/187, subd. (a)),¹ shooting at an occupied vehicle (§ 246), and possession of a firearm by a felon (§ 29800, subd. (a)(1)). Appellant raises two issues on appeal. First, he asks us to conduct an independent review of his *Pitchess* hearing (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) and of documents produced pursuant to *Brady v. Maryland* (1963) 373 U.S. 83. Second, he contends that the matter must be remanded for the trial court to exercise its discretion under section 12022.53, as amended by Senate Bill No. 620 (SB 620), whether to strike the firearm enhancement. We remand for the trial court to exercise its discretion under section 12022.53. In all other respects we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

The Shooting

On January 8, 2013, around 5:30 p.m., Adolfo Pacheco was sitting in his car on Long Beach Boulevard in Compton. He saw a red Bronco turn onto Long Beach Boulevard, followed by a Monte Carlo, which came to a stop behind the Bronco. A Black man wearing a hooded sweatshirt and carrying an AK-47, later identified as appellant, got out of the driver's side of the Monte Carlo, jogged toward the Bronco, and

¹ Unspecified statutory references will be to the Penal Code.

shot six to nine times at the Bronco. Pacheco ducked down when the shooting started and sat back up when he heard the shots stop. When Pacheco sat up, he saw the Monte Carlo reverse and head toward Oak Street. Pacheco saw what he believed to be an unmarked Los Angeles County Sheriff's Department SUV pass by, so he stuck out his hand and pointed toward Oak to indicate the direction in which the Monte Carlo had driven.

Los Angeles County Sheriff's Deputy Christopher Gomez was driving the SUV, and Deputy Laura Perales was in the passenger seat. They were driving on Long Beach Boulevard approaching Oak Street when Perales heard six to eight gunshots and Gomez heard about nine gunshots. Perales saw a Black man with cornrows running on Long Beach Boulevard and holding an assault rifle. He appeared to be running away from a red SUV. Perales later identified appellant as the man she had seen running.

Pacheco flagged down Perales and Gomez, pointed to the Monte Carlo and said something such as, "He's the one that shot him." Perales saw appellant get into the driver's side of a Monte Carlo.

The Monte Carlo made a U-turn and faced Perales and Gomez. Perales saw appellant in the driver's seat and a passenger in the car. Gomez saw appellant in the driver's seat and a Hispanic passenger in the front seat, later identified as codefendant Eduardo Ulloa.

Appellant drove away quickly, followed by Perales and Gomez. Ulloa leaned out the passenger window and began shooting at Perales and Gomez with the assault rifle Perales had seen earlier. Perales heard four to five shots and saw muzzle flashes.

Around the corner of Pine Street and Santa Fe, the Monte Carlo slowed, the passenger door opened, and the passenger fell out of the car. Gomez saw the muzzle of a rifle sticking out of the passenger's sweatshirt. Ulloa ran away, and appellant continued driving.

Deputies Samuel Gutierrez and John Werner responded to the call. They saw the Monte Carlo being driven recklessly and then colliding with another car. They took appellant into custody.

Pacheco identified appellant as the shooter in a field show-up and identified the Monte Carlo. Perales and Gomez also identified appellant and the Monte Carlo. After appellant was identified, Gutierrez and his partner performed a gunshot residue test on him.

Perales was shown a Hispanic male in a field show-up. She identified him as the passenger who had shot at her, but he was later identified as Jonathan Vasquez. Vasquez was detained and investigated as a possible suspect but was never charged in the case.

About 5:40 p.m. on January 8, 2013, Joe Campos heard sirens and saw some children screaming and pointing to a gun under a car. Campos stopped a passing deputy and told him about the gun. Deputy David Perry saw what appeared to be an AK-47 assault rifle beneath a car. Perales recognized the weapon as the one Ulloa was shooting and carrying when he left the car. Gomez also identified the rifle as the one he had seen Ulloa carrying earlier.

Deputy Joseph Figueroa found Jose Rodriguez still alive in the driver's seat of a Bronco parked near Long Beach Boulevard and Oak Street. Rodriguez suffered bullet wounds to his abdomen and leg, but

survived. Several bullet fragments were removed from his body and given to a detective.

The Investigation

Los Angeles County Sheriff's Department investigator David Ozeta found 14 cartridge casings near where the shooting occurred. He found a red Ford Bronco on Long Beach Boulevard with bullet damage, broken glass, and possible blood in it. Ozeta also found a rifle under a car and a spring and slide cover for the rifle nearby. He found two cartridge casings in the Monte Carlo. After Ozeta completed his investigation, the Bronco and the Monte Carlo were towed to a tow yard.

Deputy Nina Gonzales was the lead detective in the case. She went to the tow yard on January 15, 2013, and saw three cartridge casings on the left rear seat of the Monte Carlo. Gonzales called Ozeta to have him photograph the casings. Ozeta went to the tow yard and found three more cartridge casings in the back seat of the Monte Carlo.

Los Angeles County Sheriff's Department criminalist April Wong test fired the rifle found in this case and identified the cartridge casings as having been fired from the rifle. Three bullet fragments from the Bronco were similar to the test-fired cartridges but could not positively be matched to the rifle. The ammunition had a stamp indicating it was made by a Russian manufacturer, Klimovsk. The gunshot residue test of appellant's hands indicated the presence of tin, which is not generally found in American ammunition but is found in many Russian brands of ammunition.

Detective Gonzales arrested Ulloa in July 2014 and placed him in a jail cell with an informant and recorded their conversation. Ulloa told the informant that his “crimie is a black dude” and that the police began following them on Long Beach Boulevard. Ulloa further said that he got out of the car and ran and threw the gun into a yard, but a child “snitched” on him. He said that appellant crashed the car and was arrested.

Defense Evidence

Los Angeles County Sheriff’s Department criminalist Anselmo Casas examined the Monte Carlo at the tow yard on January 9, 2013. He collected touch DNA samples and gunshot residue from the car.

Los Angeles County Sheriff’s Department criminalist Kristina Fritz tested Vasquez’s sweatshirt for gunshot residue. The sweatshirt contained particles characteristic of and consistent with gunshot residue, including tin.

Procedural Background

Appellant was charged by information as follows: count 1, attempted murder of Rodriguez (§§ 664/187, subd. (a)); count 2, shooting at an occupied vehicle (§ 246); count 3, attempted murder of Perales; count 4, attempted murder of Gomez; count 5, assault of Perales (§ 245, subd. (d)(3)); count 6, assault of Gomez; and count 8, possession of a

firearm by a felon (§ 29800, subd. (a)(1)).² The information contained firearm allegations (§ 12022.53, subds. (b), (c), & (d)) and gang allegations (§ 186.22, subd. (b)). It was further alleged that appellant had suffered one prior strike. (§§ 667, subd. (d), 1170.12.)

On May 4, 2016, the jury found appellant guilty of count 1, attempted murder of Rodriguez; count 2, shooting at an occupied vehicle; and count 7, possession of a firearm by a felon. The jury was unable to reach a verdict as to counts 3, 4, 5, and 6, and the court declared a mistrial as to those counts. The jury found the firearm allegations to be true and the gang allegations not true.

On February 28, 2017, appellant was sentenced to a term of 39 years to life, calculated as follows: as to count 1, seven years to life, doubled for the prior strike, plus 25 years to life for the firearm enhancement. The court imposed and stayed the sentences on the other counts pursuant to section 654.

DISCUSSION

I. *Pitchess*

Appellant asks us to independently review the transcript of the *Pitchess* hearing and the unredacted *Brady* material that was produced. Respondent does not object to the request.

² Ulloa was charged in count 7 with possession of a firearm by a felon. Ulloa pled guilty and is not a party to this appeal. The parties referred to count 8 as count 7 at trial so that the jury would not speculate as to why there was no count 7.

The jury rendered its verdict on May 4, 2016. Prior to sentencing, on June 9, 2016, a new attorney substituted in for appellant. On September 8, 2016, defense counsel filed a motion for discovery under *Pitchess* and *Brady*.

The trial court held an in camera *Pitchess* hearing on November 3, 2016. On November 15, 2016, the court ordered 15 pages of *Brady* material to be given to defense counsel, subject to a protective order.

On February 28, 2017, the court held a hearing on appellant's motion for new trial, which alleged *Brady* misconduct by the prosecutor and ineffective assistance of defense counsel for failure to file a timely *Pitchess* motion. The court denied the motion and proceeded to sentencing.

We have reviewed the *Pitchess* transcript and the unredacted *Brady* material. The trial court's decision regarding the discoverability of material in police personnel files is reviewed under the abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.) We find no abuse of discretion in the trial court's ruling.

II. *Senate Bill No. 620*

SB 620, effective January 1, 2018, amended section 12022.53, subdivision (h) to give the trial court, for the first time, the discretion to strike or dismiss a section 12022.53 enhancement. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 (*Almanza*).) Appellant contends that we should remand the case for the trial court to exercise its discretion under section 12022.53, subdivision (h). Respondent contends that

remand is not required because the trial court would not have stricken the enhancement. Respondent also argues that, in any event, it would be an abuse of discretion to strike the enhancement.

As has been established by a line of case authority dealing with SB 620, remand to allow the trial court to exercise its discretion whether to strike a section 12022.53 enhancement “is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court’s intent, remand is required when the trial court is unaware of its sentencing choices.” (*Almanza, supra*, 24 Cal.App.5th at p. 1110.) We find no such clear indication here and therefore conclude that remand is required.

In imposing sentence, the trial court initially noted that, “with respect to the sentence the court is to impose, in many respects there’s very little latitude or flexibility.” The court stated that “[w]ith respect to the allegation that [appellant] [personally] discharged a firearm causing great bodily injury within the meaning of . . . section 12022.53(d), the jury having found that allegation to be true, the court is *obligated* to impose a term of 25 to life.” (Italics added.) The court’s comments indicate its understanding that it did not have discretion to strike the firearm enhancement, consistent with the state of the law at the time. However, the law has changed.

The court’s comments at the sentencing hearing do not permit us to conclude categorically that the court would not exercise its discretion under section 12022.53, subdivision (h) to strike the subdivision (d)

enhancement in favor of a lesser enhancement of 20 years under subdivision (c), a 10-year term under subdivision (b), or perhaps no term at all. (See *Almanza, supra*, 24 Cal.App.5th at pp. 1110-1111 [remanding for the trial court to exercise its discretion on whether to strike or dismiss a firearm enhancement, explaining that “speculation about what a trial court might do on remand is not ‘clearly indicated’ by considering only the original sentence”]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428 [“remand is proper because the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements”].) “While we express no opinion on how the court should exercise its discretion on remand, that discretion is for it to exercise in the first instance.” (*Id.* at p. 428.)

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DISPOSITION

The judgment is affirmed and the matter remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h).

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WILLHITE, J.

We concur:

MANELLA, P. J.

MICON, J.*

*Judge of the Los Angeles County superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.